INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statement	2
Summary of argument	4
Argument:	
I. Congress has constitutional power to provide for trial by court-martial of all offenses committed by persons who are members of the land and naval forces	6
A. This Court's analyses of court-martial jurisdiction necessarily imply coverage of non-military crimes committed by persons in military status	8
B. The historical background of Clause 14 supports the interpretation that it gives Congress power over all criminal acts by persons in military status	11
C. Congressional action, rather than indicating any want of power under the Constitution, is indicative of an inclination to act only as particular needs arose	20
II. Congress has reasonably found a military need for the jurisdiction here involved	25
III. Petitioner was in military status when he committed the offenses	32
Conclusion	33
Appendix (Instances of Military Punishment for Non-Military Crimes, 1775–1815)	35

330-341—69——1

CITATIONS

Cases:

	Page
Billings v. *Truesdell*, 321 U.S. 542	32
Burns v. *Taylor*, 274 F. 2d 141, certiorari denied, 364 U.S. 837	11
Burns v. *Wilson*, 346 U.S. 137	31
Caldwell v. *Parker*, 252 U.S. 376	15
Coleman v. *Tennessee*, 97 U.S. 509	8
Dynes v. *Hoover*, 20 How. 65	6
Duncan v. *Louisiana*, 391 U.S. 145	29, 30
Gibson v. *United States*, 329 U.S. 338	32
Grafton v. *United States*, 206 U.S. 333	8, 21, 23
Grimley, In re, 137 U.S. 147	32
Hironimus v. *Durant*, 168 F. 2d 288, certiorari denied, 335 U.S. 818	32
Homlitas v. *United States*, 202 F. Supp. 520	33
Hurtado v. *California*, 110 U.S. 516	29
Johnson v. *Sayre*, 158 U.S. 109	6, 8
Kahn v. *Anderson*, 255 U.S. 1	32
Kinsella v. *United States ex rel. Singleton*, 361 U.S. 234	4, 6, 8, 10, 11
Lee v. *Madigan*, 358 U.S. 228	22
Mason, Ex Parte, 105 U.S. 696	6, 15
Milligan, Ex Parte, 4 Wall. 2	6, 7, 8
Owens v. *Markley*, 289 F. 2d 751	11
Orloff v. *Willoughby*, 345 U.S. 83	28, 30
Quirin, Ex Parte, 317 U.S. 1	4, 7, 8
Reid v. *Covert*, 354 U.S. 1	7, 8, 20
Smith v. *Whitney*, 116 U.S. 167	8
Thompson v. *Willingham*, 318 F. 2d 657	3, 11
Toth v. *Quarles*, 350 U.S. 11	9
Whelchel v. *McDonald*, 340 U.S. 122	7
Wright v. *Markley*, 351 F. 2d 592	11

Constitution, statutes, and regulations:

	Page
Constitution of the United States:	
Bill of Rights	30
Article I	4
Article I, Section 8, clause 14	6, 7, 11, 19
Article III	25
Fifth Amendment	6, 7
Sixth Amendment	6, 29
Fourteenth Amendment	29
Act of April 23, 1800, Ch. 33, 2 Stat. 45, *et seq.*	15
Act of March 3, 1863, Ch. 75, § 30, 12 Stat. 731	21
12 Anne, c. 13	18
Article of War 44, of 1720	18
Articles of War of 1775	12, 16
Articles of War of 1776	16
Section IX, Article 1	15
Section X, Article 1	15
Articles of War of 1786	16
Articles of War of James II, Arts. XVII–XVIII, reprinted in Winthrop, App. V, p. 922	17, 18
Articles of War, 1916 (39 Stat. 650)	21, 22, 23
British Articles of War of 1765 (Winthrop, App. VII)	19
43 Geo. 3, c. 20	18
Military Justice Act of 1968, Public Law 90–632, 82 Stat. 1335	31
Mutiny Act of 1720	18, 19
Revised Stat. 1342, Art. 59 (1874)	21

Constitution, statutes, and regulations—Continued
Uniform Code of Military Justice: Page
10 U.S.C. 701(e) 32
10 U.S.C. 810 29
10 U.S.C. 814 24
10 U.S.C. 833 29
10 U.S.C. 880 2
10 U.S.C. 918 24
10 U.S.C. 920 24
Soldiers and Sailors Civil Relief Act of 1940 (50 U.S.C. App. 501, et seq.) 33
10 U.S.C. 930 2
10 U.S.C. 934 2, 13
Army Regulation 22–160 26
Army Regulation 27–10, c. 7 26
Army Regulation 633–1, para. 9 26
1 W. & M., c. 4 (reprinted in Winthrop, App. VI, p. 929) 18
Miscellaneous:
Articles of Confederation, Article 9, Para. 4 11
3 Blackstone, Commentaries 379 30
1 Crosskey, *Politics and the Constitution*, (1953) 20
Duke and Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction*, 13 Vand. L. Rev. 435 17, 18, 23
5 J. Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia in 1787 (2d ed. 1901)* 11

Miscellaneous—Continued

	Page
2 M. Farrand, *The Records of the Federal Convention of 1787*, (1911)	11
Frankfurter and Landis, *The Business of the Supreme Court* (1928)	25
Alexander Hamilton, *The Federalist*, Number 23	11
Hearing Before the Senate Subcommittee on Military Affairs, an Appendix to S. Rep. No. 130, 64th Cong., 1st Sess	23
Hearings pursuant to S. Res. 260 before the Subcommittee on Constitutional Rights of Committee on the the Judiciary, 87th Cong., 2d Sess	25
2 Journals of the Continental Congress 89	12
1 Macaulay, *History of England*, 231 (1874 ed.)	17
NATO Status of Forces Agreement, Article VII, 4 U.S.T. 1792; T.I.A.S. 2846; 199 U.N.T.S. 67	26, 27
Petition of Right of 1627, 3 Car. 1, c. 1	17
S. Rep. No. 1630, 90th Cong., 2d Sess. (1968)	27
Summary-Report of Hearings by the Subcommittee on Constitutional Rights of the Committee on the Judiciary, Constitutional Rights of Military Personnel, 88th Cong., 1st Sess. (Committee print 1963)	25
Weigley, *History of the United States Army* (1967)	24
Wiener, *Civilians under Military Justice* (1967)	19
Wiener, *Courts-Martial and the Bill of Rights, the Original Practice I*, 72 Harv. L. Rev. 1	16
Winthrop, *Military Law and Precedents* (1920 War Dept. Reprint)	13, 14, 15, 17
14 Writings of Washington	14

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 646

JAMES F. O'CALLAHAN, PETITIONER

v.

PARKER, WARDEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the court of appeals (R. 27–34)[1] are reported at 390 F. 2d 360. The opinion of the district court (R. 21–26) is reported at 256 F. Supp. 679.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 1968. A petition for a writ of certiorari was filed on May 6, 1968, and was granted on October 14, 1968 (R. 36). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

[1] "R." refers to the Joint Appendix filed in this Court.

QUESTION PRESENTED

This Court granted certiorari limited to the first question presented by the petition, which reads as follows (R. 36):

> Does a court-martial, held under the Articles of War, Tit. 10, U.S.C. § 801 et seq., have jurisdiction to try a member of the Armed Forces who is charged with commission of a crime cognizable in a civilian court and having no military significance, alleged to have been committed off-post and while on leave, thus depriving him of his constitutional rights to indictment by a grand jury and trial by a petit jury in a civilian court?

STATEMENT

After a trial by court-martial in the then Territory of Hawaii, petitioner, a sergeant in the Army, was convicted on all charges against him: attempted rape, housebreaking with intent to commit rape, and assault with intent to rape (10 U.S.C. 880, 930, 934). On October 11, 1956, he was sentenced to ten years' confinement at hard labor, forfeiture of all pay and allowances, and a dishonorable discharge. The Army Board of Review affirmed and in March 1957 the United States Court of Military Appeals declined review (R. 4).

The evidence (which is set forth in detail in the opinion of the court below at R. 30–33) showed that petitioner, on the night of July 20, 1956, while on leave and off his military post, entered the room of a fourteen year old girl in the Reef Hotel in Honolulu with

intent to commit rape, and struck and bound her in the course of a rape attempt before the girl managed to escape and shout for assistance. Petitioner was apprehended as he was attempting to leave the hotel grounds, and the civilian police subsequently turned him over to the military.

The present case arises from a habeas corpus action commenced by petitioner in the United States District Court for the Middle District of Pennsylvania in April 1966, in which he attacked (*inter alia*) the jurisdiction of the court-martial to try him for a non-military offense committed off-post while on leave. The district court declined to consider the issue, since petitioner had raised it in a prior habeas corpus proceeding in the District of Massachusetts when he was confined there (R. 23). Chief Judge Wyzanski had denied the Massachusetts petition with a memorandum opinion and petitioner took no appeal.[2] Petitioner appealed the denial of his present habeas corpus petition to the United States Court of Appeals for the Third Circuit, which considered the jurisdictional question and held, on the basis of its ruling in *Thompson* v. *Willingham*, 318 F. 2d 657 (C.A. 3), that court-martial jurisdiction existed (R. 34).

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[2] In connection with the Memorandum in Opposition to the instant certiorari petition, we lodged with the Clerk of this Court a copy of Judge Wyzanski's unreported opinion. Petitioner was then in custody because of his conviction in Massachusetts for rape in 1962 while on parole from his federal sentence, and is presently in custody by reason of the resulting revocation of the federal parole in 1966 after the state sentence had been served. Petitioner is currently due to be released in June 1970.

330-341—69——2

SUMMARY OF ARGUMENT

This Court has consistently indicated its view that the test for determining the constitutionality of court-martial jurisdiction in time of peace is the status of the accused—*i.e.*, whether the accused is a member of the land and naval forces—and not the nature of the offense. See, *e.g.*, *Ex parte Quirin*, 317 U.S. 1, 43; *Kinsella* v. *United States ex rel. Singleton*, 361 U.S. 234, 239–243. Article I of the Constitution, which grants power to Congress "[t]o make Rules for the Government and Regulation of the land and naval Forces," bears no limitation as to types of offenses or the place where they are committed. The Framers entrusted Congress with the responsibility to determine, within the limits of procedural fairness, whether and how members of the land and naval forces would be tried for offenses committed while they are in such status.

History supports this view. Records of courts-martial trials during the period contemporaneous with the Constitution's ratification show that such trials of members of the army for non-military offenses committed off-post or while on leave were frequent. The Framers, many of whom served in the Continental Army, were undoubtedly aware of the practice of trying soldiers for such conduct pursuant to the general military article. Nor does the prior British history of court-martial jurisdiction support a reading of the Constitution which would limit court-martial jurisdiction to certain types of offenses. That history reflects only a long-standing dispute between Parliament and

the Crown as to which of them had the power to prescribe articles of war in time of peace. The Framers chose to have such power reside in Congress.

Congressional action in the field of court-martial jurisdiction has reflected these principles. In the earliest period, Congress conferred jurisdiction on courts-martial to try members of the navy who were accused of non-military offenses on shore. That specific jurisdiction over non-military crimes committed by members of the army in wartime was not enacted until pose to act only as a need arose. Until the Civil War this country's standing army was small and the general article was considered adequate to handle the limited number of cases that might arise. With that conflict and the world wars which later ensued, the size of the standing army grew drastically, necessitating more specialized provisions for dealing with military offenders.

Court-martial jurisdiction over non-military crimes is concurrent with that of civil authorities and effective accommodations have been worked out. Although petitioner argues that trial by jury in all instances would be a preferable mode of trial for servicemen, the Framers expressly left that choice to Congress. Moreover, servicemen are not well situated to enjoy the benefits of trial by jury in civilian courts, since their society and peers tend to be other members of the military establishment with whom they form a separate community. Court-martial jurisdiction avoids the separation of the accused from that com-

the third year of the Civil War and was not extended to peacetime until 1916 indicates, rather than any lack of constitutional power, merely a congressional pur-

munity and enables military authorities to maintain control over military personnel.

The congressional judgment that members of the armed forces today who commit non-military offenses should remain subject to court-martial jurisdiction is thus reasonable and should be respected. The fact that petitioner was on leave when he committed the instant offenses did not remove him from the status of a member of the land and naval forces. It follows that the judgment below should be affirmed.

ARGUMENT

I

CONGRESS HAS CONSTITUTIONAL POWER TO PROVIDE FOR TRIAL BY COURT-MARTIAL OF ALL OFFENSES COMMITTED BY PERSONS WHO ARE MEMBERS OF THE LAND AND NAVAL FORCES

Court-martial jurisdiction derives from Article I, Section 8, Clause 14 of the Constitution, which vests in Congress the power "[t]o make Rules for the Government and Regulation of the land and naval Forces". There is no dispute that the power there granted includes the power to create offenses and to punish them. See *Kinsella* v. *United States ex rel. Singleton,* 361 U.S. 234, 246–247. And of course, when a case arises in the land or naval forces, the Fifth and Sixth Amendment rights to indictment by a grand jury and to trial by a petit jury are inapplicable. *Dynes* v. *Hoover,* 20 How. 65, 78–79; *Ex Parte Milligan,* 4 Wall. 2, 137–139; *Ex Parte Mason,* 105 U.S. 696, 700–701; *Johnson* v. *Sayre,* 158 U.S. 109; *Ex Parte*

Quirin, 317 U.S. 1, 40; *Whelchel* v. *McDonald*, 340 U.S. 122, 127. The grand jury provision of the Fifth Amendment explicitly excepts "cases arising in the land or naval forces", and the exception applies by implication also to the petit jury provision of the Sixth Amendment. *Ex Parte Milligan, supra; Ex Parte Quirin, supra.* These exceptions are "designed to correlate with the power granted Congress to provide for the 'Government and Regulation' of the armed services * * *." *Reid* v. *Covert*, 354 U.S. 1, 22.

This case thus concerns the scope of Article I, Section 8, Clause 14. The basic question is whether the power of Congress to provide for punishment of offenses in the exercise of its power over the land and naval forces depends solely on the status of the person who commits the offense or whether it varies according to the nature of the offense he commits and the place where he commits it. As we show below, the decisions of this Court have consistently made the scope of the court-martial power granted by Clause 14 turn upon the military status of the individual tried, and history supports that view. Whether and how to exercise that power over military personnel is a matter for legislative judgment. Since petitioner's status was unquestionably that of a soldier when he committed the offenses here involved, and since Congress has made the judgment that soldiers charged with those offenses may be tried by court-martial, petitioner was validly convicted and is validly in custody.

A. THIS COURT'S ANALYSES OF COURT-MARTIAL JURISDICTION NECESSARILY IMPLY COVERAGE OF NON-MILITARY CRIMES COMMITTED BY PERSONS IN MILITARY STATUS

Although this Court has never explicitly decided the question presented here, it has consistently treated court-martial jurisdiction as dependent solely upon the military status of the person tried, without regard to the nature of his offense. And it has consistently declared its considered view that persons serving in the armed forces may constitutionally be subjected to court-martial for any offense they commit while so serving. *E.g., Ex Parte Milligan,* 4 Wall. 2, 123; *Coleman* v. *Tennessee,* 97 U.S. 509, 513–514; *Smith* v. *Whitney,* 116 U.S. 167, 183–185; *Johnson* v. *Sayre,* 158 U.S. 109, 114; *Grafton* v. *United States,* 206 U.S. 333, 348; *Ex Parte Quirin,* 317 U.S. 1, 43; *Reid* v. *Covert,* 354 U.S. 1, 23; *Kinsella* v. *United States ex rel. Singleton,* 361 U.S. 234, 246.

In *Ex Parte Quirin, supra,* (sustaining military trial of belligerent aliens or citizens for attempted sabotage in the United States in time of war) the Court thoroughly examined the foundations of military jurisdiction and observed:

> The exception from the Amendments of "cases arising in the land or naval forces" was not aimed at trials by military tribunals, without a jury, of such offenses [by nonmembers of the forces] against the law of war. Its objective was quite different—to authorize the trial by court martial of the members of our Armed Forces for all that class of crimes which under the Fifth and Sixth Amendments might otherwise have been deemed triable in the civil

> courts. The cases mentioned in the exception are not restricted to those involving offenses against the law of war alone, but extend to trial of all offenses, including crimes which were of the class traditionally triable by jury at common law. * * * [317 U.S. at 43.]

This Court's more recent decisions sustaining challenges to military power to try persons not members of the armed forces in peacetime have in no way undermined this doctrine as to persons who are members of the armed forces, and indeed their analysis sustains it: *E.g., United States ex rel. Toth* v. *Quarles,* 350 U.S. 11; *Reid* v. *Covert, supra; Kinsella* v. *United States ex rel. Singleton, supra. Kinsella,* the last major pronouncement on court-martial jurisdiction, provides an illuminating review of the decisions in *Toth* and *Covert,* and concludes with a succinct statement of the principle that governs the present case as well as those cases:

> The *Toth* case involved a discharged soldier who was tried by court-martial after his discharge from the Army, for an offense committed before his discharge. * * * The holding of the case may be summed up in its own words, namely, that "the power granted Congress 'To make Rules' to regulate the 'land and naval Forces' would seem to restrict court-martial jurisdiction to persons who are actually members or part of the armed forces." *Id.,* at 15.
>
> It was with this gloss on Clause 14 that the Court reached the second *Covert* case, *supra.* There, as we have noted, the person involved was the civilian dependent of a soldier, who was accompanying him outside the United States

> when the capital offense complained of was committed. The majority concluded that "trial by court-martial is constitutionally permissible *only* for persons who can, *on a fair appraisal,* be regarded as falling within the authority given to Congress under Article I to regulate the 'land and naval Forces'. * * * Concurring opinion, 354 U.S., at 42. (Italics supplied). The test for jurisdiction, it follows, is one of *status,* namely, whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term "land and naval Forces." [361 U.S. at 239–241. Footnote omitted.]

Significantly, in *Kinsella,* which also involved the power of a court-martial to try a civilian dependent of a member of the armed forces, the government sought to distinguish *Covert* on the basis that *Covert* concerned a capital offense. In rejecting the distinction, the Court observed:

> The Government makes no claim that historically there was ever any distinction made as to the jurisdiction of courts-martial to try civilian dependents on the basis of capital as against noncapital offenses. Without contradiction, the materials furnished show that military jurisdiction has always been based on the "status" of the accused, rather than on the nature of the offense. To say that military jurisdiction "defies definition in terms of military 'status' " is to defy unambiguous language of Art. I, § 8, cl. 14, as well as the historical background thereof and the precedents with reference thereto. [361 U.S. at 243. Footnote omitted.]

In other words, the test evolved by this Court, con-

sistent with the history and plain language of Clause 14, is whether there is jurisdiction over the *person* of a court-martial defendant; the grant of power to Congress under Clause 14 "bears no limitation as to offenses." *Kinsella, supra,* 361 U.S. at 246. Implicitly applying this test, the lower federal courts have uniformly rejected the challenge to court-martial jurisdiction here advanced. *E.g., Burns* v. *Taylor,* 274 F. 2d 141 (C.A. 10), certiorari denied, 364 U.S. 837; *Owens* v. *Markley,* 289 F. 2d 751 (C.A. 7); *Thompson* v. *Willingham,* 318 F. 2d 657 (C.A. 3); *Wright* v. *Markley,* 351 F. 2d 592 (C.A. 7).

B. THE HISTORICAL BACKGROUND OF CLAUSE 14 SUPPORTS THE INTERPRETATION THAT IT GIVES CONGRESS POWER OVER ALL CRIMINAL ACTS BY PERSONS IN MILITARY STATUS

Clause 14 was taken from the parallel provision of the Articles of Confederation without discussion (2 M. Farrand, *The Records of the Federal Convention of 1787,* 329–330 (1911); 5 J. Elliott, *Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787,* 442–443, 544–545 (2d ed. 1901)). Article 9, Paragraph 4 of the Articles of Confederation gave Congress, *inter alia,* "sole and exclusive right and power of * * * making rules for the government and the regulation of the * * * land and naval forces." Alexander Hamilton wrote in *The Federalist,* Number 23, that this power (in addition to the power to raise armies and to build and equip fleets) was intended "to exist without limitation, because it is impossible to foresee or define the extent

and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them."

Military practice at the time of ratification of the Constitution indicates—contrary to petitioner's undocumented assertion (Pet. Br. 7) that "all conventional crimes committed by members of the armed forces were tried by jury before civilian courts"—that court-martial jurisdiction was commonly understood to include the trial of soldiers for non-military offenses, even when committed off-post and off duty. An examination of court-martial cases actually tried during the period reveals numerous instances of court-martial trials of servicemen for non-military offenses. In the Appendix hereto we have listed more than 100 such instances, including the crimes of simple assault of a civilian, drunkenness, rioting in town, fraud, and cashing a bad check in a civilian restaurant. Among the more serious offenses can be found housebreaking (as charged in the instant case), theft, robbery, and attempted sodomy. Moreover, it appears that many of these offenses occurred off-post or were committed by servicemen not in duty status at the time of the offenses, or had both of those characteristics.

The statutory vehicle for such court-martial prosecutions was the so-called general article, first enacted in the 1775 Articles of War prepared by a committee headed by George Washington and adopted by the Continental Congress (see 2 Journals of the Continental Congress 89–90, 110). The article provided:

> "All crimes, not capital, and all disorders and neglects, which officers and soldiers may be

> guilty of, to the prejudice of good order and military discipline, though not mentioned in the articles of war, are to be taken cognizance of by a general or regimental court-martial, according to the nature and degree of the offence, and be punished at their discretion"[3] (Articles of War of 1775, Article L).

The Framers of the Constitution, many of whom served in the Continental Army during the Revolutionary War and participated in the drafting and adoption of the early articles of war, were undoubtedly aware of this practice of trying soldiers by court-martial for non-military offenses under the general article. In fact, George Washington, upon being informed of the decision of a military Court of Inquiry that a complaint by a civilian against an officer should lie only in civil law, placed the following in his General Order for Wednesday, February 24, 1779:

> The General is sorry to find that the court seem to have mistaken his intention. He had no doubt that an inhabitant who conceives himself aggrieved by an officer has a right to seek

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[3] Set forth in Winthrop, *Military Law and Precedents* 957 (1920 War Department Reprint of 2d ed. 1896) (hereafter Winthrop).

The so-called general article, or a variant thereof, has appeared in each subsequent enactment of articles of war by Congress (see Winthrop, pp. 953, 961, 976, and 986) including the latest enactment of the Uniform Code of Military Justice (10 U.S.C. 934).

Petitioner's historical discussion errs in pointing only to the specific prohibitions of the articles of war at the time of ratification of the Constitution, and ignores altogether the use of the general articles to punish non-military crimes.

> redress from the civil-law; but he wishes to have the opinion of the court explicitly on the particular merits of the complaint against Colo. Craige in order to determine how far the complainant might be entitled to redress from military justice.
>
> All improper treatment of an inhabitant by an officer or soldier being destructive of good order and discipline as well as subversive of the rights of society is as much a breach of military, as civil law and as punishable by the one as the other. * * * [14 Writings of Washington 140–141 (1779)].

See also *id.* at 185–186.

In 1776 new articles of war were adopted by Congress, continuing the general article and adding two new provisions that are particularly illuminating:

> Every officer commanding in quarters, garrisons, or on a march, shall keep good order, and, to the utmost of his power, redress all such abuses or disorders which may be committed by any officer or soldier under his command; if, upon complaint made to him of officers or soldiers beating, or otherwise ill-treating any person; of disturbing fairs or markets; or of committing any kind of riots to the disquieting of the good people of the United States; he the said commander, who shall refuse or omit to see justice done on the offender or offenders, and reparation made to the party or parties injured, as far as part of the offender's pay shall enable him or them, shall, upon proof thereof, be punished, by a general court-martial, as if he himself had committeed the crimes

> or disorders complained of [Articles of War 1776, Section IX, Article 1].
>
> Whenever any officer or soldier shall be accused of a capital crime, or of having used violence, or committed any offense against the persons or property of the good people of any of the United American States, such as is punishable by the known laws of the land, the commanding officer and officers of every regiment, troop, or party, to which the person or persons so accused shall belong, are hereby required *upon application duly made* by or in behalf of the party or parties injured, to use his utmost endeavor to deliver over such accused person or persons to the civil magistrate * * *. [Articles of War of 1776, Section X, Article 1; Emphasis added.] [4]

Section IX, Article 1, considered with the following section providing for delivery of offenders to civil authorities "upon application duly made", strongly suggests that, if no application was made, military jurisdiction was to be exercised when the people of the States were subjected to abuses and disorders by officers or soldiers. Indeed, as has been indicated, this was in fact the way in which these provisions were interpreted and administered, and this Court has noted the practice. See *Ex Parte Mason,* 105 U.S. 696, 699; *Caldwell* v. *Parker,* 252 U.S. 376, 381–382.

A further defect in petitioner's argument on the intention of the Framers as revealed in the early American articles of war may be found by examining the Articles for the Better Government of the Navy (Act of April 23, 1800, Ch. 33, 2 Stat. 45). See Wiener,

[4] Set forth in Winthrop, *supra* n. 3, at 961, 964.

Courts-Martial and the Bill of Rights: The Original Practice I, 72 Harv. L. Rev. 1, 13–15. There Congress gave naval courts-martial specific jurisdiction over "[a]ll offences committed by persons belonging to the navy while on shore" which could be punished as if they had occurred at sea (2 Stat. 47, Article XVII). At sea, court-martial jurisdiction extended to such common law crimes as murder, embezzlement, and theft (2 Stat. 48, Articles XXI, XXIV, XXVI). It is incongruous to argue that the Framers of the Constitution did not intend to grant Congress the power to extend court-martial jurisdiction to non-military offenses because the Articles of War passed by Congress in 1775, 1776 and 1786 contained no such specific grant of jurisdiction, while at the same time the Naval Articles, also passed by Congress, did grant such specific jurisdiction. Rather, it is thus made clear that the constitutional grant of legislative power generally as to the "land or naval forces" was understood to be broad enough to cover criminal acts by military personnel on leave in United States territory. Whatever statutory limitations there were on Army courts-martial were therefore the result of legislative choice, and not of any want of constitutional power to adopt identical provisions for both services.

The prior British history on which petitioner relies does not suggest any purpose of the Framers of the Constitution to limit the power of Congress to determine which offenses committed by members of the armed forces should be subject to trial by courts-martial. That history shows only that Parliament did not trust the Crown to make that determination and

reflects the long-standing dispute as to which of them might establish military law within the realm in time of peace (see Winthrop, *supra* n. 3, 19–20).

While the origin of the court-martial is unclear, it had become well established by the seventeenth century that in time of war the Crown could adopt articles of war governing the army. Duke and Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction*, 14 Vand. L. Rev. 435, 441–442 (1960) (hereafter Duke and Vogel). In the early seventeenth century, Charles I further issued commissions for the enforcement of military law against soldiers and sailors in time of peace. Parliament rejoined with its Petition of Right of 1627 (3 Car. 1, c. 1, set forth at Pet. Br. 16), demanding that the "aforesaid commissions, for proceeding by martial law, * * * be revoked" and that no commissions of like nature thereafter issue. Charles I assented and dissolved the tribunals, and as late as the 1680's English law permitted no court-martial jurisdiction in time of peace, even for military offenses such as "knocking down [one's] colonel." See 1 Macaulay, *History of England*, 231 (1874 ed.), set forth at Pet. Br. 17–18. In 1688, however, James II issued articles of war for the governance of the standing army in time of peace, which included punishment for such non-military crimes as "murders and wilful killing of any Person" and "Robbery and theft committed by any Person in or belonging to the Army." Articles of War of James II, Arts. XVII–XVIII, re-

printed in Winthrop, App. V, p. 922. Parliament responded again in the Bill of Rights of 1689, which provided that standing armies in peacetime were unlawful without the consent of Parliament, and almost immediately thereafter consolidated its control with the first Mutiny Act, providing for court-martial of soldiers in time of peace but specifically restricting the jurisdiction to the offenses of mutiny, sedition and desertion. 1 W. & M., c. 4, reprinted in Winthrop, App. VI, p. 929.

Petitioner's examination of the pertinent British history prior to adoption of the Constitution stops at this point (Pet. Br. 18–19). Thus, petitioner not only misinterprets the tug-of-war over legislative jurisdiction as a parliamentary antipathy to courts-martial as such, but also ignores relevant subsequent developments in Britain that were more immediately in the minds of the American Framers than was the earlier history.

In 1712 Parliament authorized the Crown to adopt articles of war providing generally for courts-martial of soldiers in overseas dominions in time of peace (12 Anne, c. 13; Duke and Vogel p. 444).[5] Subsequently, the articles of war provided, pursuant to Section 46 of the Mutiny Act of 1720, that if no application for civil jurisdiction was made within eight days of an offense punishable under the articles, the offender might be tried by court-martial (Article of War 44 of 1720). While the "within eight days" provision was

[5] In 1803, this authorization was extended to permit articles of war applicable to troops stationed in England in peacetime (43 Geo. 3, c. 20; Duke and Vogel, p. 444).

in effect, the law officers held that, in the absence of a civil complaint within eight days, a court-martial could lawfully try a soldier for murder (Wiener, *Civilians under Military Justice,* Appendix 1A, pp. 245–246 (1967) (hereafter Wiener)). In 1721, the "within eight days" section of the Mutiny Act was dropped; thereafter it was only "in our garrison of Gibraltar, Island of Minorca, Forts of Placentia and Annapolis Royal, * * * or in any other Place beyond the Seas, * * * where there is no form of Our Civil Judicature in Force" that crimes not mentioned in the Mutiny Act could be tried by courts-martial (Wiener p. 14), and this provision remained in the British Articles of War of 1765, applicable at the time of the American Revolution. See Winthrop, App. VII, pp. 931, 937. It is noteworthy that Parliament did thus recognize for a time that where no civil application was made a soldier could be tried by court-martial for a civil offense.[6] That Parliament chose to restrict that jurisdiction at a later date indicates only that the legislature had determined the grant of jurisdiction to be no longer expedient, not that there was any constitutional bar. Significantly, the Framers did not choose to import any similar limitations into the American Constitution.

The foregoing history does not suggest any intent to limit the scope of Article I, Section 8, clause

[6] This relatively recent, although discontinued, British practice may well have been the basis for the civil application procedure specified in the American Articles of War of 1776, quoted *supra*, pp. 14–15.

14 of the Constitution to military offenses; rather it shows the background of struggle between the Parliament and the Crown that resulted in the Framers' decision to vest power to determine jurisdiction over the land and naval forces in the legislative Branch. As Mr. Justice Harlan, concurring in *Reid* v. *Covert*, 354 U.S. 1, 68, stated:

> True, the records of the time indicate that the Founders shared a deep fear of an unchecked military branch. But what they feared was a military branch unchecked by the *legislature*, and susceptible of use by an arbitrary *executive* power. So far as I know, there is no evidence at all that the Founders intended to limit the power of the *people*, as embodied in the legislature, to make such laws in the regulation of the land and naval forces as are necessary to the proper functioning of those forces. In other words, there is no indication that any special limitation on the power of Congress, as opposed to the power of the executive, was subsumed in the grant of power to govern the land and naval forces. * * *

See also 1 Crosskey, *Politics and the Constitution*, 413–414, 424–425 (1953).

C. CONGRESSIONAL ACTION, RATHER THAN INDICATING ANY WANT OF POWER UNDER THE CONSTITUTION, IS INDICATIVE OF AN INCLINATION TO ACT ONLY AS PARTICULAR NEEDS AROSE

In 1863, during the Civil War, Congress for the first time made *specific* provision in the Articles of War for the trial of non-military crimes in time of

war.[7] Until then, the general article had been considered to provide the Army (as distinguished from the Navy, see *supra* pp. 15–16) with an adequate basis for the exercise of such non-military criminal jurisdiction as might be necessary for the regulation of its small force. Except for minor changes in 1874 removing the duty to surrender soldiers to civil authorities in time of war (Rev. Stat. 1342, Art. 59), the pertinent Articles were not further revised until 1916. There continued to be no specific provision—other than the traditional jurisdiction over non-capital crimes under the general article, see *Grafton* v. *United States,* 206 U.S. 333, 348—relating to non-military offenses in peacetime.

The revised Articles of 1916 (39 Stat. 650) first made specific provision for peacetime court-martial jurisdiction over various enumerated non-capital of-

[7] The provision, contained within an enactment for the enrolling and calling out of national forces, passed by Congress in March 1863, was as follows:

> That in time of war, insurrection, or rebellion, murder, assault, and battery with an intent to kill, manslaughter, mayhem, wounding by shooting or stabbing with an intent to commit murder, robbery, arson, burglary, rape, assault and battery with an intent to commit rape, and larceny, shall be punishable by the sentence of a general court-martial or military commission, when committed by persons who are in the military service of the United States, and subject to the articles of war; and the punishments for such offence shall never be less than those inflicted by the laws of the state, territory, or district in which they may have been committed [Act of March 3, 1863, ch. 75, § 30, 12 Stat. 731, 736].

fenses committed by members of the armed forces.[8] A separate article also extended court-martial jurisdiction over the capital crimes of murder and rape committed in peacetime outside the geographical limits of the States or the District of Columbia.[9] In addition, the general article was modified[10] and an exception to mandatory delivery of offenders to civil authorities upon application was created for offenders held pend-

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[8] Article 93. Various crimes—Any person subject to military law who commits manslaughter, mayhem, arson, burglary, robbery, larceny, embezzlement, perjury, assault with intent to commit any felony, or assault with intent to do bodily harm, shall be punished as a court-martial shall direct.

[9] Article 92. Murder—Rape—Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court-martial may direct; but no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace.

In *Lee* v. *Madigan*, 358 U.S. 228, relied on by petitioner (Pet. Br. 10, 22), which arose under this article, the Court construed the statutory language "in time of peace" to bar court-martial trial of a member of the armed forces charged with conspiring to commit murder (in the United States) in June 1949, after cessation of hostilities in World War II, but prior to formal declarations of peace with the belligerents. The Court stated that its construction of the statute (since repealed; see *infra*, pp. 23–24) was based on our "long history" of reluctance to give [military tribunals] authority to try people for nonmilitary offenses" (*id.* at 232). We do not dispute that legislative reluctance. As indicated, it does not, however, measure constitutional power.

[10] The new general article, renumbered Article 96, read as follows:

> Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital, of which persons subject to military law may

ing a military trial or under sentence for violation of the military articles.[11] See, generally, Duke and Vogel, pp. 451–453.

The provisions of the 1916 articles relating to jurisdiction over non-military offenses remained essentially the same until the enactment of the Uniform Code of Military Justice in 1950, which is presently in effect. The only substantive changes effected by the Code[12] (insofar as pertinent here) were (1) the extension of court-martial jurisdiction in time of peace to the capital offenses of murder and rape committed within the

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be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court.

The change from the previous general article was to transpose the phrase "to the prejudice of good order and military discipline" to modify only "all disorders and neglects" but not "all crimes or offenses not capital." The purpose of the new article was to include all non-capital offenses not specifically enumerated—a result deemed consistent with the language in *Grafton* v. *United States*, 206 U.S. 333, 348. See Hearing Before the Senate Subcommittee on Military Affairs, an Appendix to S. Rep. No. 130, 64th Cong., 1st Sess., 25, 91.

[11] Article 74. Delivery of Offenders to Civil Authorities—When any person subject to military law, except one who is held by the military authorities to answer, or who is awaiting trial or result of trial, or who is undergoing sentence for a crime or offense punishable under these articles, is accused of a crime or offense committed within the geographical limits of the State of the Union and the District of Columbia, and punishable by the laws of the land, the commanding officer is required, except in time of war, upon application duly made, to use his utmost endeavor to deliver over such accused persons to the civil authorities, or to aid the officers of justice in apprehending and securing him, in order that he may be brought to trial. * * *"

[12] The principal purpose of the Uniform Code was to overhaul and update court-martial *procedures*.

United States (see 10 U.S.C. 918, 920) and (2) modification of the provision calling for delivery of offenders to civil authorities so as to make such delivery discretionary under such regulations as the Secretary concerned may prescribe (10 U.S.C. 814).

Petitioner misinterprets the early inaction of Congress in the field of legislation of specific articles of war relating to non-military crimes. Rather than any want of power under the Constitution, the history of the articles of war shows an inclination to legislate only as a need arose. At the time of the signing of the Constitution, the strength of the army was but 718 men. Weigley, *History of the United States Army* 566 (1967). As of July 31, 1968, more than a million and a half men were serving in the army both in the United States and abroad. When armies were small and were designed only for times of crisis, the need for specific articles of war setting forth crimes was slight. The general article served sufficiently as a framework to maintain discipline and to protect the rights of servicemen accused of crime. The need for specific articles of war relating to non-military crimes increased, however, with the outbreak of the Civil War and again with the expansion of the army before the First World War. Each time Congress, under its power to make rules for the government and regulation of the armed forces, passed new Articles enlarging court-martial jurisdiction. In similar fashion, Congress permitted much of its regulatory power under the Commerce Clause to remain dormant for a century and longer. Congress did not act to clothe the lower Federal courts with a substantial part of their

jurisdiction, pursuant to the power conferred by Article III of the Constitution, until 1875. See Frankfurter and Landis, *The Business of the Supreme Court* (1928), pp. 65–69. And a similar delay in the exercise of congressional power can be found in the Fourteenth and Fifteenth Amendment areas.

II

CONGRESS HAS REASONABLY FOUND A MILITARY NEED FOR THE JURISDICTION HERE INVOLVED

Court-martial jurisdiction over non-military offenses by servicemen has been recently reviewed by Congress. In 1962 the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary held hearings [18] at which it considered the constitutionality and wisdom of such jurisdiction, concluding that:

> * * * The subcommittee does not favor an outright prohibition of the trial of civil offenses by court-martial, even if the prohibition were to relate only to offenses committed in the United States during peacetime. Such a prohibition would be difficult to administer, might in some instances act to the detriment of the serviceman, and would place an undue burden on military authorities in the performance of their duty to maintain discipline. [Summary-Report of Hearings by the Subcommittee on Constitutional Rights of the Committee on the Judiciary, *Constitutional Rights of Military Personnel*, 88th Cong., 1st Sess. 22–26 (Committee print 1963)].

[18] Hearings pursuant to S. Res. 260 before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, 87th Cong., 2d Sess.

In its review, Congress took into account the manner in which military jurisdiction over non-military crimes has in fact been exercised. With respect to crimes that are also subject to federal civilian prosecution, there has since 1955 been a "Memorandum of Understanding" between the Departments of Justice and Defense.[14] Basically, under this agreement, primary jurisdiction over federal offenses committed on military installations is in the Department of Defense, while primary jurisdiction over federal offenses committed off military installations is in the Department of Justice. Thus, the concurrent military jurisdiction granted by Congress is, in practice, a residual jurisdiction exercised only where the Department of Justice does not act, although the Department of Justice may agree to relinquish its primary jurisdiction in particular cases because of "factors relating to the administration and discipline of the Armed Forces." Similar working arrangements govern the concurrent jurisdiction of the States and the military. Army Regulation 633–1, para. 9 (September 13, 1962) makes it Army policy to deliver members to State and local civilian authorities for trial, upon request, unless the best interests of the service would be prejudiced thereby.[15] In fact, the State and local authorities are more

[14] Implemented by an Army Regulation, AR 22–160 (October 7, 1955); today AR 27–10, c. 7, November 26, 1968.

[15] Procedures for the exercise of criminal jurisdiction over United States forces personnel in overseas areas are contained in the various status of forces agreements between the United States and its allies. The criminal jurisdiction provisions of most of these agreements are patterned after Article VII of the NATO Status of Forces Agreement (Agreement between the parties to the North Atlantic Treaty regarding the status

interested in taking jurisdiction over serious offenses and do so in the great majority of cases.[18]

Congress has had ample reason for concluding that the reasonable interests of the services—and of their

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of their forces (1951), 4 U.S.T. 1792; T.I.A.S. 2846; 199 U.N.T.S. 67). Under the article, criminal jurisdiction over offenses punishable by both the law of the host country and United States military law is shared pursuant to a formula whereby the United States military authorities have the primary right to exercise jurisdiction over all *inter se* and official duty offenses, and the foreign authorities have the primary right to exercise jurisdiction over all other concurrent jurisdiction offenses. This formula applies to nearly all of the serious crimes that may be committed by United States servicemen, *e.g.*, murder, rape, robbery, arson, larceny, etc.

Foreign authorities waive their primary right to exercise jurisdiction in most cases. The United States Senate Committee on Armed Services has reported (S. Rep. No. 1630, 90th Cong., 2d Sess., 2–3 (1968)) that during the period December 1, 1966, through November 30, 1967, 21,305 United States servicemen were charged with offenses over which foreign authorities had the primary right to exercise jurisdiction. The foreign authorities waived jurisdiction in 17,988 of these cases, for a worldwide waiver rate of 84 percent. The waiver rate in NATO countries was 93 percent.

Thus, most serious non-military offenses committed by United States military personnel overseas are left to disposition by the United States military authorities in accordance with United States military law. For example, during the period covered in the Senate Report, out of a total of 276 rape cases foreign authorities waived their jurisdiction in 213 cases.

[18] Army statistics show that civil authorities took jurisdiction over about 85 percent of the approximately 5,000 serious offenses committed by Army men off post in 1967. Army statistics further show that, if the rule petitioner seeks had been applied from 1966 to the present, 20 percent of the offenses tried by general court-martial as non-military offenses would not have been tried in military courts and prosecution would have been left exclusively to the civil authorities. Air Force statistics for the period 1956 through 1967 show a somewhat higher figure of 34 percent.

members—justify such court-martial jurisdiction over non-military crimes. The necessity of discipline to a properly functioning army is obvious (see *Orloff* v. *Willoughby*, 345 U.S. 83, 94–95), and offenses off post as well as on duty have an impact upon the general discipline of a military unit. Even more than its interest in the deterrence of its members from transgressions against the civilian community, the military has a strong interest in rehabilitating offending members and retaining them—as much as possible—in the units where they are needed. The reality of these considerations is demonstrated by the fact that the vast majority of the offenses over which the military exercises jurisdiction are misdemeanors, which require neither discharge from the service nor extended incarceration as penalties. The military community has special resources for limited restraint and special training so that both it and its offending members can have, where appropriate, the advantages of punishment less extreme than civilian imprisonment or even probation, which might well be inconsistent with normal military responsibilities. Recognizing these military interests, civil authorities frequently waive jurisdiction over non-military offenses where the military authorities desire to retain the alleged offender in the military community. They would be less likely to do so if that waiver of jurisdiction meant that the offender could not be punished in some suitable manner.

Moreover, establishing exclusive jurisdiction in the civilian courts would be likely to delay the disposition of cases against accused servicemen. It is common knowledge that delays in bringing offenders to trial in

some areas of the country have reached substantial proportions.[17] Such delays would seriously hamper the operation of the armed forces, since an accused serviceman awaiting trial in a civilian jurisdiction could not be transferred and might, therefore, become separated from his military unit or from the vessel or aircraft to which he is assigned.

Petitioner's argument is based on the premise that trial by jury in a civilian court must be deemed preferable to the system created by Congress for the trial of members of the armed forces.[18] We do not underrate the importance of the jury trial guarantee for civilians. See *Duncan* v. *Louisiana*, 391 U.S. 145. The critical determination of "public policy", however, was made by the Framers in expressly exempting cases arising in the land or naval forces from the requirements of the petit and grand jury provisions of the

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[17] An accused serviceman's right to a speedy trial by court-martial is protected by the Uniform Code (10 U.S.C. §§ 810, 833). Statistics gathered by the Army indicate that only 56.9 days, on the average, elapsed in bringing an accused serviceman to trial by general court-martial during the period January 1, 1968, to October 31, 1968.

[18] To the extent that petitioner's argument is premised upon the proposition that the Framers of the Constitution never contemplated that the serviceman committing a non-military offense in a State would be tried in other than a State court where he would be accorded his constitutional right of indictment by grand jury and trial by petit jury (see Pet. Br. 9), it is instructive to note that the Framers rejected a constitutional amendment granting the right to jury trial in State courts (see *Duncan* v. *Louisiana*, 391 U.S. 145, 153). It was only recently that this Court in *Duncan*, *supra*, held the jury trial provision of the Sixth Amendment applicable to the States via the "due process" clause of the Fourteenth Amendment. Even now there is no constitutional right to indictment by grand jury in a State court. *Hurtado* v. *California*, 110 U.S. 516 (1884).

Bill of Rights. Such a determination, with which no court is competent to interfere, needs no "justification" in the ordinary sense. Nevertheless, we point out that sound reasons support the Framers' decision.

Historically, the cornerstone of the jury system was trial of the individual by "twelve of his neighbors and equals" (3 Blackstone, *Commentaries* 379), a concept expressed in modern terminology as "community participation in the determination of guilt or innocence" (*Duncan* v. *Louisiana, supra,* at 156). Juries today may be composed, to be sure, of persons not neighbors of the accused and may sometimes try persons from outside the community who have come there only to commit a crime. Nevertheless the system functions most properly when the jury represents the community where the accused resides (most often the place of his criminal derelictions) and can thus pass a more meaningful moral as well as legal judgment on his actions.

Members of the military are not well situated to enjoy the benefits of this mode of trial in civilian courts. To a significant extent they are separated from the local civilian community. Their real "community" consists primarily of other members of the military forces from all parts of the nation, constantly moving about among a variety of military installations throughout the country. As this Court has recognized (*Orloff* v. *Willoughby,* 345 U.S. 83, 94): "The military constitutes a specialized community governed by a separate discipline from that of the civilian." A

soldier's "peers" are not likely to be persons in the local civilian community, but other members of his military post. Not infrequently local civilian inhabitants may even harbor bias against members of the military stationed in a nearby base in general or against those of a particular ethnic or racial group.

The Framers' decision to exempt military trials from the jury trial guarantee and to leave to Congress the determination of the scope of the jurisdiction (in terms of offenses) to be exercised by courts-martial over servicemen thus has a realistic base. Congress has, as we have shown, implemented that power gradually, using it to its present-day extent only after military needs made it inevitable that persons serving in the armed forces would for the most part be stationed away from their own communities and indeed apart from the civilian community generally. And at the same time Congress has improved the court-martial system to define the rights of those subject to military law, and provide complete institutions and facilities within the military system to secure those rights. *Burns* v. *Wilson*, 346 U.S. 137, 140–142. See, also, the Military Justice Act of 1968, Public Law 90–632, 82 Stat. 1335. The Framers of the Constitution entrusted to Congress the task of defining, within the limits of procedural fairness, the balance to be struck between the rights of men in the armed forces and the overriding demands of discipline and duty. The reasoned congressional judgment in this area must be accepted.

III

PETITIONER WAS IN MILITARY STATUS WHEN HE COMMITTED THE OFFENSES

There is no serious dispute that petitioner was "in the land or naval forces" at the times when the crimes were committed and his court-martial occurred. Compare *Billings* v. *Truesdell*, 321 U.S. 542; *Gibson* v. *United States*, 329 U.S. 338; *Kahn* v. *Anderson*, 255 U.S. 1; *In re Grimley*, 137 U.S. 147. The only apparent basis for an argument to the contrary—that petitioner was on authorized leave when he committed the offenses—is (apart from mention in the Question Presented as a factor bearing on jurisdiction) not relied on by petitioner. Such a contention would, in any event, be insubstantial.

Servicemen on leave do not temporarily lose their military status. Their leave is subject to cancellation at any time and they remain within the full control of the military authorities. The existence of military jurisdiction over persons on leave was upheld in *Hironimus* v. *Durant*, 168 F. 2d 288 (C.A. 4), certiorari denied, 335 U.S. 818, where the defendant's terminal leave was revoked only a few days before her discharge would have become effective, and she was subsequently tried and convicted by court-martial of larceny. The court of appeals, in sustaining court-martial jurisdiction, recognized that military personnel on authorized leave continue by congressional enactment to draw their pay and even accrue leave as does any other person on active duty. See 10 U.S.C. 701(e). Moreover, they retain all other rights and benefits including the protections of the Soldiers and Sailors

Civil Relief Act of 1940 (50 U.S.C. App. §§ 501, *et seq.*). See, also, *Homlitas* v. *United States*, 202 F. Supp. 520, 522 (D. Ore.). The fact that they are on leave, in short, does not change their status as members of the land or naval forces.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

ERWIN N. GRISWOLD,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

JAMES VANR. SPRINGER,
Deputy Solicitor General.

BEATRICE ROSENBERG,
ROGER A. PAULEY,
Attorneys.

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APPENDIX

Instances of Military Punishment for Non-Military Crimes, 1775–1815

There follows a summary of the instances where the military, during the period 1775 through 1815, assumed jurisdiction of apparently non-military criminal offenses committed by military personnel. The General Orders of Washington, Wayne, Wilkinson, as well as the Orderly Books of the Corps of Artillerists and Engineers, and some proceedings available at the National Archives were used as sources. This summary does not purport to represent all of the courts-martial during this period since courts-martial were also convened by regimental commanders; the General Orders of these commanders are generally unavailable.

A. WRITINGS OF WASHINGTON

(Examined for the period from Washington's assumption of command at Cambridge in 1775 until the relinquishment of his commission in 1783)

1. H.Q., Cambridge, July 7, 1775 (Vol. 3, p. 317), "A General Court Martial to sit to morrow, 10 O'Clock A.M. for the Trial of Thomas Raniely, charged with 'stealing' "

2. H.Q., Cambridge, July 29, 1775 (Vol. 3, p. 377). James Foster, Charge: "robbing Dr. Foster, Surgeon of the General Hospital."

3. H.Q., Cambridge, August 21, 1775 (Vol. 3, p. 439). Michael Berry, Charge: "stealing a hat from Capt. Waterman."

4. H.Q., Cambridge, September 24, 1775 (Vol. 3, p. 516). George Hamilton, "soldier in Capt. Dexters Company," Charge: "stealing a blue great coat, the property of Salomon Lanthorp."

5. H.Q., Cambridge, September 28, 1775 (Vol. 3, p. 524). John Hawkins and Robert Higgins, Charge: Theft ("upon appeal from a Regiment Court Martial").

6. H.Q., Cambridge, October 17, 1775 (Vol. 4, p. 35). Lt. Thomas Randell, Charge: "Stabbing a matross in the said regiment."

7. H.Q., New York, May 8, 1776 (Vol. 5, p. 24). Timothy Dawney, Charge: "attempting to stab Joseph Laffin, assaulting John Phipps, and for snapping a loaded musket at Luther Proute."

8. H.Q., New York, May 10, 1776 (Vol. 5, p. 32). Joseph Child of New York Train of Artillery, Charge: "defrauding Christopher Stetson of a dollar," and other charges.

9. H.Q., New York, May 10, 1776 (Vol. 5, p. 32). Zodiac Piper and Thos. Walkins, Charge: "being concern'd in a riot Saturday night."

10. H.Q., New York, May 22, 1776 (Vol. 5, p. 74). Andrew O'Brien, serjeant and William Welch, Corporal, Charge: "assaulting, beating, and dangerously wounding, one William Irvine."

11. H.Q., New York, June 2, 1776 (Vol. 5, p. 95). Hugh Killbreath, of Capt. Rosse's Company, Charge: "assaulting, beating and wounding Assa Baker, and David Avery of the Artillery."

12. H.Q., New York, June 16, 1776 (Vol. 5, p. 106). Lt. Van-Hook, Charge: "beating Sally Paterson, an inhabitant of this town, on the head with a stick."

13. H.Q., New York, July 1, 1776 (Vol. 5, p. 209). William Hurly of Capt. Parks Company, Charge: "firing on and wounding without cause one Peter Child a citizen."

14. H.Q., New York, August 11, 1776 (Vol. 5, p. 411). Joseph Martin of Capt. Hurds Company, Charge: "abusing and robbing a woman in the market."

15. H.Q., New York, August 16, 1776 (Vol. 5, p. 441). David Astin of Col. Sillimans Regiment, Charge: "breaking open a store and stealing rum, molasses and fish."

16. H.Q., Morristown, April 7, 1777 (Vol. 7, p. 365). Lt. Carnes, Charge: "converting to his own use the property—viz: A horse and half Johannes, belonging to one Baxter."

17. H.Q., Morristown, April 17, 1777 (Vol. 7, p. 422). Lt. Costigan, Charge: "pressing a horse, the property of John Kidd Esqr. of Bucks County (Pennsylvannia) appropriating him to his own use."

18. H.Q., Morristown, May 13, 1777 (Vol. 8, p. 59). Serjt. Hyliard, Serjt. Hallbrook, Corporal Smith, Philip Hendrick, and, Stephen Lee, Charge: "suspected of having robbed the house of Elias Bland."

19. H.Q., Morristown, May 13, 1777 (Vol. 8, p. 60). Joseph Bordon, Charge: "theft."

20. H.Q., Middle-Brook, June 13, 1777 (Vol. 8, p. 245). Alexander Brandon, Charge: horse stealing.

21. H.Q., Clove, July 18, 1777 (Vol. 8, p. 424). John Van Dyck, Charge: stealing three hundred dollars and desertion.

22. H.Q., near the Cross Roads, August 17, 1777 (Vol. 9, p. 88). Capt. Holmes, Charge: "Going into one Palmer's garden, tearing cucumbers from the vines and abusing and striking Dr. Smith."

23. H.Q., Valley Forge, January 28, 1778 (Vol. 10,

p. 3[illegible] William Dearlove, Charge: "stealing money from Frederick Buzzard." Stephen Rice, Charge: "plundering the inhabitants of the county."

24. H.Q., Valley Forge, March 14, 1778 (Vol. 11, p. 83). Lieutt. Enslin, Charge: "Attempting to commit sodomy with John Monhort a soldier & swearing to false accounts."

25. H.Q., Valley Forge, March 23, 1778 (Vol. 11, p. 133). Sgt. John Henry Leiders, Charge: "wounding with his sword one Henry Trautcher."

26. H.Q., Valley Forge, April 16, 1778 (Vol. 11, p. 266). Lieutt. Orr, Charge: "conniving with Serjeant Hughes in secreting stolen goods" and other charges.

27. H.Q., Valley Forge, May 29, 1778 (Vol. 11, p. 486). Captain Medaras, Charge: Forgery.

28. H.Q., Valley Forge, June 5, 1778 (Vol. 12, p. 22). Lieutt. McDonnald, Charge: "taking two mares and a barrel of carpenter tools on the lines which mares he conveyed away and sold the tools at a private sale."

29. H.Q., Valley Forge, June 13, 1778 (Vol. 12, p. 54). Captain Henderson, Charge: "extorting a sum of money from Alexander Bayard an inhabitant of this state."

30. H.Q. Peramus, July 12, 1778 (Vol. 12, p. 172). Lieutt. West, Charge: "plundering the house of Mrs. Golf."

31. H.Q., White Plains, July 27, 1778 (Vol. 12, p. 242). Mrs. James Davidson, Quarter Master, Charge: "defrauding the soldiers," "em ezzling Continental Property and disposing of several Articles belonging to the United States."

32. H.Q., White Plains, August 8, 1778 (Vol. 12, p. 299). John Armstrong, a Private, Charge: "stealing a key."

33. H.Q., White Plains, August 31, 1778 (Vol. 12,

p. 375). Captain Ewell, Charge: "embezzling money the property of several soldiers" and "embezzling Cloathing belonging to the Public."

34. H.Q., White Plains, September 9, 1778 (Vol. 12, p. 415). Samuel Bond, Charge: "Picking a lock and breaking into a public store," and stealing.

35. H.Q., Frederickburgh, October 23, 1778 (Vol. 13, p. 136). Hate-evil Colston of Col. Nixon's Regiment, Charge: "entering the house of Rueben Crosly an Inhabitant of Frederick's burgh, by force of arms in company with one more, and taking from thence about three hundred dollars in Continental Money, one Musquet, one pair of plated Shoebuckles and sundry other articles."

36. H.Q., Fredericksburgh, October 23, 1778 (Vol. 13, p. 137). Glover, Goldsmith, and Lamb, soldiers, Charge: "plundering house of Daniel Burch of some Cash, sundry articles of wearing Appearl and Household Furniture." Glover was also charged with "stealing from inhabitants whilst encamped at White Plains & stealing from inhabitants on the march."

37. H.Q., Fredericksburgh, October 23, 1778 (Vol. 13, p. 138). Brown, Herrick, Herring, Walton, Charge: several specifications of breaking and robbing homes.

38. H.Q., Middle Brook, February 11, 1779 (Vol. 14, p. 99). Colo. Craige, Charge: "beating and otherwise illtreating Caleb Brokaw an Inhabitant of this state."

39. H.Q., Middle Brook, February 17, 1779 (Vol. 14, p. 102). Lieutenant William Jenkins, Charge: "embezzling public property."

40. H.Q., Middle Brook, April 22, 1779 (Vol. 14, p. 424). Zimmerman, Serjeant; Gray, Private; Fisher, Farrier; Lankford, Private; and Garner, Private; Charge: "commiting sundry robberies on the good people of the United States."

41. H.Q., Middle Brook, May [illegible]8, 1779 (Vol. 15, p. 100). Carson, Garnick, Cane, Johnston, Hitchcock, Charge: "breaking into and robbing the house of Mr. Van Noorstrand an inhabitant."

42. H.Q., Camp Middle Brook, May 22, 1779 (Vol. 15, p. 131). Edward Hawkins, soldier, Charge: "attempting to fire on an inhabitant in the night" and other charges.

43. H.Q., Middle Brook, May 27, 1779 (Vol. 15, p. 163). Roger Finney, William Martin, Charge: "housebreaking & robbery."

44. H.Q., Middle Brook, May 30, 1779 (Vol. 15, p. 183). William Mackarun, soldier, Charge: "stealing horseshoes."

45. H.Q., Middle Brook, June 1, 1779 (Vol. 15, p. 207). William Scully, soldier, Charge: "entering forcibly into the house of Robert Dennis and robbing him of sundry goods, also stabbing William Cox with a bayonet."

46. H.Q., Moore's House, November 19, 1779 (Vol. 17, p. 137). Borough and Burges Rickets and Mullen as accessories; Charge: "assaulting the horse by shooting . . . robbing the owner . . . plundering his house."

47. H.Q., Morristown, January 3, 1780 (Vol. 17, p. 345). John Lewis, a soldier, Charge: "Stealing and being drunk on duty."

48. H.Q., Morristown, February 19, 1780 (Vol. 18, p. 34). Lieutenant Porter, Charge: "Unofficer, unsoldierlike, and villainous conduct upon Staten Island viz: robbing and plundering a woman of money."

49. H.Q., Morristown, March 13, 1780 (Vol. 18, p. 110). Bell, Powers, Brown, Justice, soldiers; Charge: "Plundering Mr. Bogart an Inhabitant near Paramus."

50. H.Q., Morristown, May 28, 1780 (Vol. 18, p.

434). Fry, Charge: "stealing beef, candles, rum, and meal."

51. H.Q., Pracahess, July 22, 1780 (Vol. 19, p. 224). Thomas Brown, Charge: "plundering the inhabitants" and "abusing a woman."

52. H.Q., Orangetown, August 14, 1780 (Vol. 19, p. 371). Henry Finn of Colonel Angell's regiment, Charge: "plundering the inhabitants" and "abusing a woman."

53. H.Q., Orangetown, August 20, 1780 (Vol. 19, p. 414). Jesse Hensley and Michael Bourk of the 4th Regiment of Light Dragoons, Charge: "Robbing the house of the widow Sarah Sanford."

54. H.Q., Tean Neck, August 29, 1780 (Vol. 19, p. 467). Philip Lankfitt and Richard Peters, Charge: "Robbing Joseph Wessells of sundry articles in the presence of said Wessell's wife."

55. H.Q., Steenrapia, September 12, 1780 (Vol. 20, p. 33). David Hall, a soldier, Charge: "Plundering an inhabitant of money and plate."

56. H.Q., Orangetown, September 27, 1780 (Vol. 20, p. 96). Rooney, Moore, Miller, Welch, soldiers, Charge: robbery.

57. H.Q., Totowa, October 13, 1780 (Vol. 20, p. 179). David Gamble, Charge: "possession of counterfeit money and desertion."

58. H.Q., NewWindsor, February 18, 1781 (Vol. 21, p. 240). Major Reid, Charge: embezzling public property and other charges.

59. H.Q., near York, October 30, 1781 (Vol. 23, p. 301). Gilbert Otter, soldier, Charge: "Not doing his duty as a Centinel and with assisting robbing a french officer's Wagon."

60. H.Q., Newburgh, January 28, 1783 (Vol. 26, p. 73). Cowell, Shea, Jenks, Blake, Creaton, Curtis, Urann, Cook, Woods, Goodrich, Charge: killing a cow, stealing fowls, and stealing geese.

61. H.Q., near York, November 3, 1781 (Vol. 23, p. 320). William Timmans, Charge: "Marauding, and burning the houses of different inhabitants of State of Maryland".

62. H.Q., near York, November 3, 1781 (Vol. 23, p. 322). Abraham Erwin, Charge: "Marauding in one of the barges in Chesapeak bay," and other charges.

63. H.Q., near York, November 3, 1781 (Vol. 23, p. 323). Sgt. Selkirk and James Steel, Charge: "robbing a french officer's wagon at Yorktown."

64. H.Q., Verplanks Point, September 13, 1782 (Vol. 25, p. 155). Ensign Bloodgood, Charge: "taking money out of the drawer in the barroom of the widow Charity Jacobus in a clandestine manner" and failing to clear his reputation among the officers of his regiment when charged with the same.

65. H.Q., Verplanks Point, October 11, 1782 (Vol. 25, p. 252). William Taylor, soldier, Charge: desertion and forgery.

66. H.Q., Newburgh, November 23, 1782 (Vol. 25, p. 368). John Abel, John Cogden and Philip King, soldiers, Charge: "being out of camp at an unreasonable hour and killing an ox belonging to an inhabitant."

67. H.Q., Newburgh, February 21, 1783 (Vol. 26, p. 149). Major Reid, Charge: Defrauding the United States and "embezzling public money."

68. H.Q., Newburgh, March 1, 1783 (Vol. 26, p. 174). Ensign James Sawyer, Charge: assault and robbery of a fellow officer and other charges.

69. H.Q., Friday, March 7, 1783 (Vol. 26, p. 197). Lt. Freeman, Charge: assault upon and theft from a fellow officer.

70. H.Q., Newburgh, April 15, 1783 (Vol. 26, pp. 321, 322). Ensign Herring, Charge: Embezzling public funds and stealing shirts from the common store.

(All of the entries in the Orderly Books of Major Gen. Anthony Wayne, except for the period Nov. 17, 1792 to April 11, 1793, have been printed in 34 Mich. Pion. & Hist. Coll. 341. In the references that follow, page numbers refer to the printed portions.)

71. "Hugh M. Laughlin a Soldier belonging to the Legion of the United States"; H.Q. Pittsburgh, 12 August 1792 (p. 360). Charge: "for Desertion and for stealing a horse from the widow Duncan." Findings: "Guilty of both charges". Sentence: "to suffer death." Action: "confirms the foregoing sentence and directs it to take place tomorrow morning between the hours of eight and nine."

72. Sergeant Hopkins, H.Q. Pittsburgh, 11 November 1792 (p. 403). Charge: "For riotously beating a woman kept by him as a mistress", & other charges growing out of the apprehension. Findings: Guilty, Sentence: "to be reduced to the ranks."

73. Sergeant James McGarvin, H.Q. Hobson's Choice, 31 July 1793 (p. 460). Charges: "for absenting himself from Camp, without leave and Rioting at late hours in the town of Cincinnati", and other charges.

74. "George Gaull a Private of the Garrison of Fort Washington" H.Q. GreenVille, 23 May 1794 (p. 510). Charges: "leaving his Guard on the night of the 7th December 1793 and with attempting to break open and enter into, and rob the store of Mr. Silver, trader at Cincinnati on the same night." Findings: Guilty. Sentence: one hundred lashes. Lorin Jones and Henry Goodrich were tried as accessories and acquitted.

75. "T. Sergeant & Stephen Ogden of the 1st Sub Legion," H.Q. 15 June 1794 (p. 519). Charges: "the robbing (or being accessary) of a store at this place,

kept by the agent of Mr. Samuel Creigh of Cincinnati, and taking therefrom the good of said Creigh to the amount of Twenty Pounds. Findings: Guilty. Sentence: One hundred lashes and restitution. Action: Approved. Two others were also charged, and tried; one was acquitted the other received the same sentence.

76. Ephraim Baker & Archibald McDonald, H.Q. GreenVille, 28 Sept. 1795 (p. 646). Charges: Desertion, selling and disposing of their uniform and clothing, and "stealing a horse, the property of a citizen." Findings: Guilty. Sentence: Death. Action: Approved, later remitted.

77. Malthias Gibbs, H.Q. GreenVille, 19 March 1796 (p. 686). Charges: "Stealing the horse of a friendly Indian." Fndings: "guilty of taking though not of stealing". Sentence: fifty lashes.

C. GENERAL JAMES WILKINSON'S ORDER BOOK, DEC. 31, 1798, MARCH 8, 1808

(Available on microfilm at the National Archives)

78. "Sergeant Major Montgomery of the third Regiment" ", H.Q. Fort Adams, 21 May 180[illegible] (p. 243). Charges: "For combining with other persons at present unknown to take from the Main Guard of the Camp on the night of the 18th instant a certain David Tero being then and there a prisoner and after removing said, Tero some distance from the guard for aiding and abeting (sic) other persons as yet unknown & under cover of the night in a most cruel and dastardly manner to beat, abuse, & maltreat the said Tero even to the danger of his life all which is contrary to good order and discipline, disgraceful to the profefsion (sic) of Arms and Scandalous & infamous . . ." Findings: Guilty. Sentence: "to be reduced to the ranks and to receive one hundred lashes." Ac-

tion: "The General approves the Sentence & directs that the prisoner be stript of his side Arms & Epuletts (sic) & flogged on the grand parade this evening at roll call, but as he is to be summomedend (sic) to the Civil Authority for further punishment and as it is strongly to be presumed from the tenor of the testimony adduced that he has acted the orders of a Commissioned Officer the General thinks proper to remit the corporal punishment to twenty five lashes."

79. "Lieut Wm P. Smith of the 3d Regiment" H.Q. Fort Adams, 23 May 1800 (p. 244). Charges: "First—For usurping authority to make a detachment from a line, on the night of the 18th instant and in . . . violation of the Order of the immediate Commanding Officer of the Post, to employ said detachment to seize and force a Citizen from his Quarters, and to conduct him to the Main Guard of the Camp, to the prejudice of good order, and Military discipline . . ." Second—for beating and abusing the citizen and other charges. Findings: Guilty. Sentence: Three months suspended from command, total forfeitures for three months.

80. "John Smith a private" H.Q. 3 May 1801 (p. 323). Charges: "in absenting himself from the Garrison, on the 30th of April last without permission, also with stealing the property of a citizen in the town of Pittsburgh & beating & abusing Richard Savage when detected with the property." Findings: Guilty. Sentence: "to receive ninety-nine lashes, his head to be shaved, tarred and feathered, drummed out of the Garrison with a halter around his neck, and rendered incapable of ever serving the United States."

81. Lieut Samuel Foiole, H.Q. Pittsburgh, 10 July 1801 (p. 340). Charges: Conduct unbecoming by "securing to his own use a log of Mahogany & other wood being part of the cargo floated from the ship Argus, which was sometime since wrecked near the harbor of

Charleston." Conduct unbecoming by "fraudulently keeping the above named articles, and not accounting with the consignees of the above mentioned ship . . ." and other charges centering around the abuse of his office. Findings: Not guilty of securing the logs in a manner unbecoming but guilty of fraudulently keeping the property, not guilty of some but guilty of other charges. Sentence: To be suspended from command for three months with total forfeitures for the same period. Action: approved.

82. Barney Keith, H.Q. Fort Wilkinson, 17 May 1802 (p. 387). Charges: Desertion and stealing a horse the property of Lieut. Jones. Findings: Guilty. Sentence: one hundred lashes at four different times.

83. William Walls, H.Q. Fort Wilkinson, 16 July 1802 (p. 392). Charges: "stealing horses the property of certain Indians, and traders belonging to the Creek Nation and with an intention to desert from the service of the United States." Findings: "Guilty of stealing one horse the property of Thos. Carr an Indian & two other horses the property of a person or persons unknown." Sentence: To receive one-hundred lashes and to perform hard labor "attached by leg to an iron chain and a 5½ inch shell loaded with lead or an equiv in weight, to have his head shaved and to be confined to the guard house every night, during the remainder of his term of service and on the day of its expiration to be drummed out with a Straw Halter round his neck, as unworthy to serve in the Army of the U.S., & further that four fifths of his pay monthly for the residue of his term of service to be stopt & paid to the hands of the principal agent for Indian affairs or to his order for the purpose of reimbursing the persons injured."

84. Lieutenant Woolstoncraft, H.Q., New Orleans, 16 March 1804 (p. 462). Charges: A number of speci-

fications of disobedience and neglect of duty, and a number of specifications of scandalous and infamous conduct including "suffering a prostitute woman to stay on Garrison several days & nights" allowing a prostituted woman to go on the Garrison parade, living in common with her, and lastly, with shooting and killing certain ducks the property of a Major. Findings: Not Guilty.

85. Major George Ingersoll, H.Q. Washington, 5 July 1804 (p. 479). Tried at Frederick, Md. 7 Dec. 1803. Charges: I Embezzlement of public property, two specifications, "cutting & converting to his own use for Fuel, Timber the property of the United States" and "converting Red House on Governors island into a Hen House." II Fraud, two specifications. III False muster, IV Disobedience of Orders, two specifications, alleging violations of certain orders about rations for servants. V. Scandalous and infamous conduct, five specifications; overcharging the Government for milk that he sold, selling vegetables to the Army which were raised on Government property, overcharging for the sale of potatoes, taking float wood from Government property, making false statements. Additional charge: Punishing men without giving them a court-martial. Findings: Guilty only of the additional charge.

86. Joseph Bland, H.Q. Frederick Town, 1804 (p. 491). Charges: Desertion and stealing money from a Lieutenant. Findings: Guilty. Sentence: One-hundred lashes, to reimburse $495, and hard labor for the remainder of his term of service.

87. Captain Hugh McCall, H.Q. Washington, 30 Nov. 1804 (p. 504). Charges: "living publically with a woman of infamous character in his quarters within the Garrison" and other charges. Findings: Guilty. Sentence: Suspended from command for two years. Action: Rehearing on sentence.

88. Christopher Forrester, H.Q. Natchitoches, 28 Sept. 1806, (p. 607). Charges: "Absenting himself from the Garrison, also robbing a citizen of sundry articles of wearing apparel." Findings: Guilty of the first but not guilty of robbing.

89. Lieutenant Stephen Warrel, H.Q. Natchitoches, 1 Oct. 1806 (p. 610). Charges: Shooting at a ship without reason, boarding and abusing the master. Findings: Not guilty.

90. Lieutenant William P. Clyma, H.Q. New Orleans, 27 Jan. 1807 (p. 689). Charges: "Charge 1st For conduct unbecoming an Office & a Gentleman." "Specification For being drunk, raising a riot, drawing a Dirk and attempting to stab a Citizen at the Public Ball on the night of the 28th December 1806." and other charges, of repeated drunkenness and neglect of duty. Findings: Not guilty of the first charge.

91. James Dawson, H.Q. New Orleans, 27 Jan. 1807 (p. 691). Charged: AWOL and "[illegible]ting in the city with Sailors and not returning until Tattoo." Findings: Not guilty.

92. Sergeant Cobb, H.Q., New Orleans, 17 March 1807 (p. 720). Charge: Forging the name of a military agent. Findings: Not guilty.

93. Lieutenant Williamson, H.Q., New Orleans, 24 March 1807 (p. 729). Charges: Conduct unbecoming, by keeping company with non-commissioned officers and drinking with them on a certain evening; by riding to a tavern in the afternoon with a common prostitute; by ordering a Sergeant to make a false report about the Lt. status. He was charged with an additional charge of 1. seducing others of desert; 2. "creating a riot at a Ball in Staunton, Virginia.' Findings: Guilty of all except the first part of the additional charges. Sentence: To be dismissed from the service.

94. Christopher Brandgan, H.Q., New Orleans, 12

May 1807, (p. 757). Charge: "Stealing a needle book containing five dollars and several other articles on the night of the 26th April and selling them." Findings: Not guilty.

D. ORDERLY BOOKS OF THE CORPS OF ARTILLERISTS AND ENGINEERS

(Four volumes entitled as above are in the Library of the United States Military Academy at West Point, New York. The entries run from May 7, 1795, to May 19, 1799.)

95. October 5, 1795, West Point Sgt. Harris was tried on the charge of "beating a Mr. Williams an inhabitant living near this garrison" (Book 1, pp. 157, 158, 159). Findings: "they do acquit him."

96. July 5, 1796, West Point, John Kelly, Private, charged with "abusing and using violence on Mrs. Cronkhyte, a citizen of the United States." He was found guilty and sentenced to receive seventy-five lashes (Book 3, pp. 45, 46).

97. October 13, 1796, West Point, Thomas Duncan and Samuel Moore charged with being absent from camp without leave and "marrauding upon the inhabitants." Findings: Guilty. Sentence: "to labor fifteen days "and that the sume of one dollar be stopted from the pay of each."

98. February 23, 1799, West Point, Jeremiah Gillam, Nathanel Thatcher, John Forde, Thomas Cahart, Humphrey Fagin and Andrew Mitchell, privates, charged "with stealing poultry on the night of the 20th inst. from the house of John Warren & for being absent after tattoo with out leave." Findings: Humphrey Fagin—Guilty—Sentenced twenty-five lashes and "to undergo stoppages . . . of Eleven dollars twenty-five cents; Jerimiah Gillim—Guilty to receive 25 lashes others acquitted."

E. THE PROCEEDINGS OF COURT-MARTIAL, WAR OFFICE

(A series of large M.S. folio volumes in the National Archives providing the proceedings of certain but not all courts-martial of officers from 1808 through 1815.)

99. Columbian Springs, 20 May 1809, (Vol. II, p. 90). Isiah Doane, Charge: "Ungentlemanly conduct in fight at fisticuffs with his servants at Burlington about 20th day of December AD 1808," and other charges. Findings: Acquitted of this charge but guilty of others. Sentence: to be dismissed.

100. Fort Independance, 24 May 1809 (Vol. II, p. 146). Allen G. Cushmen, Charge: Conduct unbecoming an officer, spec 1., "Ill usage of Mrs. Matheson, wife of a private . . ." spec. 2., "coming into the officers room . . . drawing a (knife) which he had kept concealed and threatening to stab some of his company," and other charges. Findings: Guilty. Sentence: Cashiered.

101. Fort Powhatan, 22 November 1809 (Vol. II, p. 395). Alex L. Walker, Charge: "Resisting the civil authority" spec. 1. "In drawing his sword on the sheriff of Wythe County and making his escape on or about the 25th Jan 1809." Conduct unbecoming in taking a horse belonging to Charles Lewis and disposing of the horse to his own profit, and other charges. Findings: Guilty. Sentence: Cashiered.

102. Carlisle Barracks, 8 December 1809 (Vol. II, p. 310). Ensign Neal Shaw, Charge: "savagely and cowardly attacking and breaking Cornet Haxton," and other charges. Findings: Guilty. Sentence: Reprimand.

103. Cantonment, Washington, April 24, 1810 (Vol. 3, p. 1), Surgeon's Mate William C. Smith,
Charge: "going to a civilian's house and raising a riot with the family, abusing wife and daughter,"

and other charges. Findings: Guilty. Sentence: to be dismissed.

104. Fort Fayette, 26 January 1811 (Vol. 3, p. 306). 2 Lt. Jacob Sinn, Charge: "Paying his bill in a civilian restaurant with a worthless bank bill." An additional charge of "gambling with a citizen of Pittsburgh and cheating." Findings: Guilty. Sentence: To be dismissed.

105. Fort Moultine, August 14, 1812 (Vol. 4, p. 328). Cpt. James McHelvey, Charge: Conduct unbecoming by "being drunk at Mr. Picteos Beef stake House," and being drunk at one of the common brothels. Findings: Guilty. Sentence: Dismissed.

106. Cantonment Belle Fontaine, 1 March 1813 (Vol. 5, p. 51). Cpt. Joseph Crofs, Charge: "clandestinely taking & stealing Ensign John A. Shaw's pocket book . . . at St. Louis." Findings: Guilty of a lesser offense. Sentence: Dismissed.

107. Greenbush Cantonment, 10 October 1813 (Vol. 5, p. 271). Lt. John Frarier, Charge: ". . . at the house or shop of one Thompson he insulted and abused him," and using "threatening language to citizens." Findings: Guilty. Sentence: Dismissed.

108. Nashville, Tenn., 20 April 1814 (Vol. 6, p. 113). 2 Lt. E. B. Billings, Charge: "perjury to a district court judge in Tenn." and "ungentlemanly conduct in court of Davidson County, Tenn.," also charged with defrauding the United States and other charges. Findings: Guilty. Sentence: Dismissed.

109. Greenbush Cantonment, 12 August 1814 (Vol. 6, p. 263). Lt. H. T. Sommons, Charge: "assault on a citizen," "disrespectful to a citizen in his own house," "striking a citizen at his home," and "disrespectful & insulting language to a citizen while on a march," and other charges. Findings: Guilty. Sentence: To be dismissed.

110. Portland, Me., 14 November 1814 (Vol. 6, p. 372). Col. Joseph D. Learned, Charge: "fraud and embezzlement of public monies, defrauding a civilian, and making false statements to a civilian with reference to the amount he was authorized to pay." Findings: Guilty. Sentence: Cashiered and publish the results of trial.

111. Savannah, 8 February 1815 (Vol. I, p. 12). Cpt. David C. Twiggs, Charge: "near Camp Huger, went to house of William Brotot & beat & ill-treated him," and other charges. Findings: Not guilty of the principle charge; guilty of other charges. Sentence: Suspended from service for six months and pay stopped for six months.

112. Savannah, 10 February 1815 (Vol. I, p. 33). Cpt. Felix B. Warley, Charge: signing a false libel against another officer. Defendant moved to dismiss on the grounds that "he was likewise indicted in civil courts." His motion was denied. Findings: Guilty. Sentence: Suspended for one month.

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